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VOL. 32 NOVEMBER, 1956 No. 1

The President's Page

By WILLIAM P. GRAY,
President, Los Angeles Bar Association

William P. Gray

Next September 1st (1957) J. Louis Elkins will complete his thirtieth year as Executive Secretary of the Los Angeles Bar Association, and he has recently expressed, in writing, his wish to retire on that date. In his letter Lou has offered to condition the time of his leaving upon the convenience of the Association, which is completely characteristic of the selfless generosity that has marked his every dealing with us over the years. Our convenience would best be served by persuading him to stay on indefinitely; but at long last we face a situation in which we can do no less than to reverse the usual order of priority and harmonize our preference with his.

Inasmuch as Lou will still be with us for almost a year, I will not try here to express how much he has meant to our Association and to the many of us who cherish his personal friendship. All who know him understand this full well, and it is good that we have a year in which to appreciate him anew and to tell him about it individually while he continues among us.

It is good, also, that the coming year gives many more of our members an opportunity to have the fine experience of becoming acquainted with Louis Elkins. For in him will they come to recognize more clearly the true greatness that is found in a life genuinely and quietly devoted to the service of his fellow man.*

*There is a third and subordinate purpose in this early announcement (although Lou would insist that it is of transcendent importance): we must look now for an understudy for Lou, to groom as his successor. Please advise us of any likely candidates that come to your attention.

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Negligence of the Owner or Occupier of Land, and the Injured Invitee or Licensee

By J. RANDOLPH ELLIOTT

J. Randolph Elliott

California decisions determining liability of the land owner or occupier for injuries of the licensee or invitee remain in conflict, despite *Oettinger v. Stewart* (1944) 24 C 2d 133, which expressly intended to clarify the California rule. Is there a trend toward liability based upon the general yardstick of reasonableness?

The owner or occupier of land has traditionally been charged with a degree of care directly related to the status of the injured person. The invitee is entitled to the assurance that the premises are reasonably safe and that the occupier will conduct his activities thereon with ordinary care. The licensee is entitled to protection from willful and wanton injury inflicted by the occupier, insofar as the condition of the premises is concerned, and is, it has been asserted, entitled to expect ordinary care exercised by the occupier in the conduct of his activities, when his presence is known, or should reasonably be known, to the occupier. (*Oettinger v. Stewart, supra* at p. 138; *Lucas v. Walker* (1913) 22 Cal. App. 296; Means v. So. Cal. Ry. Co. (1904) 144 C. 473.)

From the decisions, this substantial problem is clearly apparent: is there a trend toward abandonment of the common law standard of measurement in favor of a less certain standard of expediency? That is, are the courts deliberately moving away from emphasis upon legal relationship between the possessor and the injured invitee or licensee, and away from the degrees of care attendant upon

such relationship, to base their decisions upon what would be reasonably expected of the possessor under the circumstances? A leaning in the decisions has certainly been noted,[1] and a rule of reasonableness has been recently asserted by Justice Carter to be the intent of Civil Code Section 1714.[2]

The California rule has been repeatedly expressed,[3] but many of the reported decisions do not reflect the application of the rule. In *Lucas v. Walker* (1913) 22 Cal. App. 296 the court correctly stated the California rule as follows:

> "A licensor does owe the duty to exercise ordinary care to avoid by any overt act injuring a licensee upon his premises with his knowledge and consent, and is responsible in damages for any injury resulting to the licensee from his overt act of negligence." (p. 301.)

In that case, an employee of the defendant contractor engaged in construction of a business building negligently operated an elevator in an unfinished shaft, and in so doing struck and injured an employee of Otis Elevator Co., who was working in an adjoining shaft, in completing the elevator installation ordered by the defendant. *Lucas v. Walker* evidences a fairly clearcut application of the rule. And in 1944, *Oettinger v. Stewart* restated the California rule and

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[1]See Fernandez v. American Bridge Co. (1951) 104 C.A. 2d 340, at 343; and see Crane v. Smith (1944) 23 C. 2d 288, at pages 296, 297, where the court broadly defined an invitee as follows: "In order to be an invitee or business visitor, it is not necessary that the visitor himself be upon the land for the purpose of the possessor's business, but it is sufficient that he be on the premises for the convenience or necessity of one who is upon the land for such purposes."

[2]Palmquist v. Mercer (1954) 43 C. 2d 92, 105; Civil Code Sec. 1714: "Responsibility for willful acts, negligence, etc. Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief. (Enacted 1872.)"

[3]Allen v. Jim Ruby Construction Co. (1955) 138 C.A. 2d 428, 433; Saba v. Jacobs (1955) 130 C.A. 2d 717, 718 (hearing denied); Powell v. Jones (1955) 133 C.A. 2d 601, 607. Palmquist v. Mercer (1954) 43 C. 2d 92, 102; Fisher v. General Petroleum Corp. (1954) 123 C.A. 2d 770, 777-779, (hearing denied); Fernandez v. American Bridge Co. (1951) 104 C.A. 2d 340, 343; Newman v. Fox West Coast Theatres et al (1948) 86 C.A. 2d 428, 431; Oettinger v. Stewart (1944) 24 C. 2d 133, 138; Lucas v. Walker (1913) 22 C.A. 296, 301. In Boucher v. American Bridge Co. (1950) 95 C.A. 2d 659, at 667, the court said, "There is considerable confusion in the authorities, especially in California, as to the difference in liability of an invitor to an invitee, from that of a licensor towards a licensee or an owner to a trespasser." In that case plaintiff was injured when he fell 35 feet from the steel framework of an unfinished building. Plaintiff, an installer of electrical work, attempted to reach the ground by walking across a steel bracing truss toward a ladder belonging to defendant's employees. While walking, plaintiff grasped an unsecured supporting steel member to steady himself, and fell to the ground. The loose piece was part of the unfinished structural work being done by defendant's employees, defendant being the structural steel subcontractor. The opinion was hinged on a comparison between Restatement of Torts, Section 342 and Witkin's California Summary.

specifically disapproved earlier, conflicting cases.[4] The rule was reaffirmed and applied in *Boucher v. American Bridge Co.*, supra.

At the other extreme are three recent, definitive cases. In *Newman v. Fox West Coast Theatres* (1948) 86 Cal. App. 2d 1948, the plaintiff-invitee recovered because of the active negligence of the defendant-owner in failing to discover and remove a foreign deposit on the floor. The overt act? A failure to remedy a defect of the premises. An interesting example of the logical development of the *Newman* decision is found in *Pomerantz v. Bryan Motors Inc.* (1949) 92 Cal. App. 2d 114, where a mechanic dropped a fuel pump on the toe of a customer. The appellate court, in affirming judgment for plaintiff, cited the *Newman* case in support of the proposition that plaintiff could recover for injuries caused by active negligence even though plaintiff was not a business visitor. Yet in *Ward v. Oakley* (1954) 125 Cal. App. 2d 840, the court explicitly limits the scope of the *Newman* case by stating that "the case merely held that where as in such case defendant's failure to comply with its duty constituted active negligence, under the law in California defendant was liable." (p. 845) See B. A. J. I. No. 212-B, which, as to licensees, states: "By the expression 'overt act', as here used, is meant some active negligence as distinguished, for instance, from a mere passive omission to alter some condition on the premises existent when the licensee entered." *Church v. Headrick & Brown* (1950) 101 Cal. App. 2d 396 sets out the importance of relationship.

In *Raich v. Aldon Construction Co.* (1954) 129 Cal. App. 2d 278 plaintiff-invitee recovered because of the active negligence of defendant general contractor (and possessor of the land) in failing to warn plaintiff, employee of subcontractor, of the presence of a high pressure gas line which, when struck by the trench digger operated by Plaintiff in the course of his employment, exploded and seriously burned plaintiff.

In *Fisher v. General Petroleum Corp.* (1954) 123 Cal. App. 2d 770 (Petition for hearing denied), there is a completely anomalous situation. Bearing in mind that the licensee is entitled to assume the exercise of ordinary care by the land occupier in the conduct

[4]24 C. 2d at page 139.

of his activities, in the same degree as the invitee,[5] in *Fisher v. General Petroleum* the plaintiff was denied recovery for death of employee-licensee who was burned to death when the blade of a bulldozer he was operating struck and ruptured a concealed plug on a high pressure gas line. The high pressure gas line and the plug were perfectly sound, yet the case of *Hall v. So. Cal. Edison Co.* (1934) 137 Cal. App. 449 was cited and quoted as being in point. In the *Hall* case, plaintiff-licensee was denied recovery when a dangerously rotted utility pole, on which plaintiff climbed to sever wires connecting a pumphouse, fell to the ground.

Fisher v. General Petroleum preceded *Raich v. Aldon Construction Co.* In the former, the court impliedly held that a smoothly functioning high pressure gas line was a defect in the premises, while in the Raich case the court held that failure to advise the operator of the trenchdigger of the buried high pressure pipe line was the overt act causing the injury. Clearly the injury to plaintiff in both cases was caused by the same kind of active negligence found by the court in *Newman v. Fox West Coast Theatres,* supra, where, in fact, the court said, "there can be no doubt that active negligence is a dereliction of duty." (p. 432) And in *Fernandez v. American* Bridge Co., supra, the court figuratively threw up its hands and said, "The California rule seems to be that, regardless of the status of the plaintiff as licensee, trespasser or invitee, where defendant knew, or should have known, of plaintiff's presence, the duty of reasonable care was owed to him." (p. 343)[6] Thus there seems logic behind the statement that recent decisions show the duty of the occupier is that imposed by society on all members—to exercise ordinary care under the circumstances.[7]

The crux of the problem is that the courts appear to be completely at odds in defining active negligence in this broad field. In the past, a moving elevator,[8] a backing truck,[9] a moving race car,[10] a steel girder falling from a moving truck,[11] a derailed train,[12] a

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[5]Yamauchi v. O'Neill (1940) 38 C.A. 2d 703; Demmon v. Smith (1943) 58 C.A. 2d 425; Lucas v. Walker, supra.
[6]This was not the first time such a statement had been made. See Oettinger v. Stewart, supra, at p. 137.
[7]22 So. Cal. Law Review p. 319; Oettinger v. Stewart, supra.
[8]Lucas v. Walker, supra.
[9]Turnipseed v. Hoffman (1944) 23 C. 2d 532; Yamauchi v. O'Neill, supra.
[10]Colgrove v. Lompoc etc Club (1942) 51 C.A. 2d 18.
[11]Fernandez v. American Bridge Co., supra.
[12]Brown v. Feather River Lbr. Co. (1928) 203 C. 493.

wielded butcher knive,[13] a shifting load on a stationary truck,[14] were easily classified as instances involving active negligence. Less clear are those cases where a moving conveyor belt,[15] a slippery substance on the floor,[16] or an exploding pipeline[17] were involved.

The directing human hand at the point of injury is being rapidly replaced. Increasingly, development of industrial and business technology is removing the operator from the machine or other instrumentality which he operates. Automation, teleactivation, and remote-controlled facilities of all kinds are forcing a re-evaluation of tests and standards established in a less complex economy. While future decisions will determine the validity of traditional standards as a yardstick upon which to base liability for negligence, industry cannot be charged with the duties of an insurer.

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[13]Demmon v. Smith, supra.
[14]Church v. Headrick & Brown, supra.
[15]Tharp v. San Joaquin etc. Co. (1938) 27 C.A. 2d 554.
[16]Newman v. Fox West Coast Theatres, supra; Travis v. Metropolitan Theatres Corp. (1949) 91 C.A. 2d 664.
[17]Fisher v. General Petroleum Corp., supra; Raich v. Aldon Construction Co., supra.

Felony Conviction for Impeachment Purposes

By ROBERT G. CARTER

"Have you ever been convicted of a felony?"

Don't guess. Be sure!

Your case may depend upon your ability to discredit the testimony of an opposing witness, and your recognition of the opposition's ability to discredit your witness. A witness may not be impeached "by evidence of a particular wrongful act, except that it may be shown by examination of the witness, or the record of the judgment, that he has been convicted of a felony." Code of Civil Procedure, §2051.

The correct determination that an opposing witness has to his credit a prior felony conviction may be the ammunition with which you can destroy his entire testimony. On the other hand, an erroneous determination may be the backfire which leads to a mistrial or a reversal on appeal.[1]

A full, correct understanding of what constitutes a "prior felony conviction" is of even more importance to the average attorney, with respect to his own witnesses, and particularly the defendant in a criminal case. The defense may well depend upon the "prior record" of the available witnesses or the defendant.

The witness has a prior conviction if, in a pre-existent criminal case, he pleaded guilty to the charge or was found guilty by the trier of fact, whether it was the jury or the court sitting without a jury. *People v. Clapp* (1944) 67 Cal.App.2d 197, 200; *In re Morehead* (1951) 107 Cal.App 2d 346, 350. "Conviction" for im-

[1]This is especially true in the prosecution of a criminal case where the defendant is a witness in his own behalf. See People v. White (1904), 142 Cal. 292; People v. Hamilton (1948), 33 Cal.2d 45.

peachment purposes is nothing more than the ascertainment of guilt by the fact-finding body or the plea of guilty by the defendant. It is the law that "conviction" does not mean the judgment based upon the verdict. *People v. Williams* (1945) 27 Cal.2d 220; *People v. Ward* (1901) 134 Cal. 301. The conviction is not suspended while the case is on appeal. *People v. Ward, supra.* The defendant stands convicted until such time as the conviction is set aside.

But proof of conviction alone is insufficent to impeach a witness. The conviction must be the conviction of a felony.

Offenses in California are divided into two groups: (1) felonies, and (2) misdemeanors. Penal Code, Sec. 16. Penal Code, Sec. 17 defines "felony" and "misdemeanor":

> "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. . . ." Penal Code, Sec. 17.
>
> "The term 'punishable by imprisonment in the state prison' implies, of course, an imprisonment expressly authorized by law, either by directly providing for imprisonment in such prison as a punishment for the commission of a particular offense, or by denominating the offense a felony and providing generally for such imprisonment of those convictions of felonies for which a specific punishment is not prescribed." *In re Humphrey* (1923) 64 Cal.App. 572; See Penal Code, Sec. 18.

In California the characterization of the offense is not determined by the length of the sentence which the court may impose but, rather, by the place of authorized incarceration. "Any offense which may be or is liable to be punished by death or imprisonment in the state prison is a felony. Any offense which is not liable to such punishment, that is, for which that grade of punishment cannot under any circumstances be inflicted, is a misdemeanor." *People v. War* (1862) 20 Cal. 117, 120.

Although the indictment or Information represents the nature of the crime of which the defendant was charged, it does not necessarily reflect the crime of which he was subsequently convicted. "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Penal Code, Sec. 1159. Although

a defendant is charged with the felony of grand theft, he may be convicted of the lesser included offense of petty theft—a misdemeanor, see *People v. Wetzle* (1908) 9 Cal.App. 223; although the defendant is charged with the felony of assault by means of force likely to produce great bodily injury, he may be convicted of the lesser included offense of simple assault — a misdemeanor. See *People v. Alderson* (1930) 105 Cal.App. 202; *People v. Spreckels* (1954) 125 Cal.App.2d 507. To impeach a witness it is, therefore, not sufficient to ascertain that he was charged with a felony but it must be determined that he was *convicted* of a felony.

The picture at this point seems apparent. If the crime of which the person stands convicted was punishable by imprisonment in the state prison, then the person has been convicted of a felony. But the entire tapestry has not yet been unveiled. Section 17 of the Penal Code, after initially defining a felony, goes on to read:

> "When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. . . ."

It is in the area of this alternative sentence-type offense that confusion arises.[2]

Prior to the 1947 Amendment to Section 17, it read in pertinent part:

> ". . . it shall be deemed a misdemeanor for all purposes, after a judgment imposing a punishment other than imprisonment in the state prison."

The 1947 Amendment deleted the words "imposing a punishment" and added the provision relating to the California Youth Authority.

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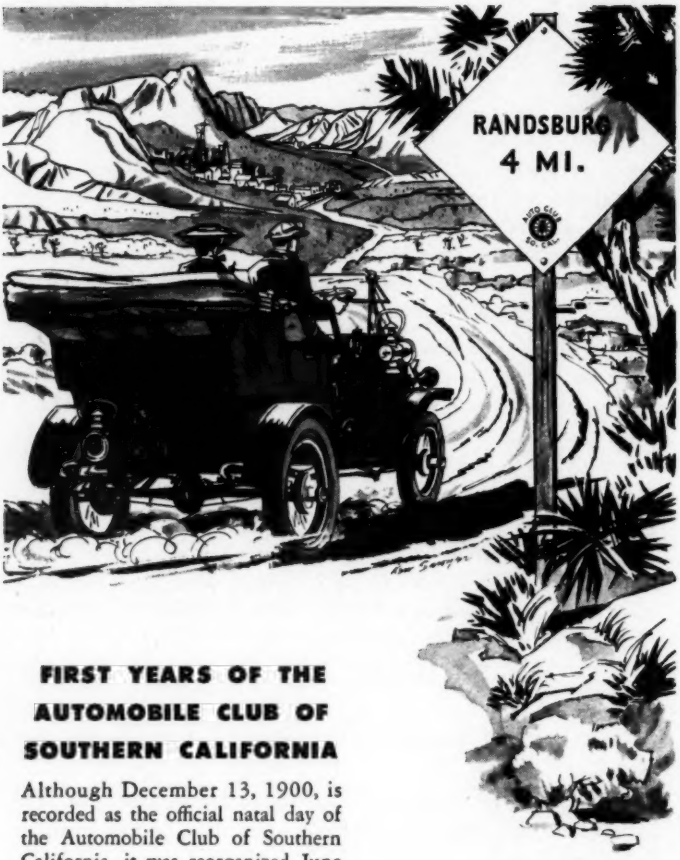
[2]Illustrative of such confusion and one of the results which may be reached is evidenced in the case of People v. Gray (1902), 137 Cal. 267 (in effect, overruled by Doble v. Superior Ct. (1925), 197 Cal. 556). In the Gray case the defendant was charged and convicted of seduction under promise of marriage, a crime punishable by either fine or imprisonment in the state prison. In view of the fact that the lower court imposed a fine, the appellate court held that the crime was a misdemeanor, that the statute of limitation for the prosecution of a misdemeanor had run before the filing of the Information, and that the case therefore should have been dismissed. The court in the Gray case failed to recognize the distinction between the case where defendant is charged with a felony but only convicted of the lesser included misdemeanor, and the case where the defendant is charged with a felony under an alternative sentence-type offense and given a misdemeanor-type sentence. In this latter situation the characterization of the offense by virtue of the sentence acts prospectively but not retrospectively; whereas, in the case of a lesser included misdemeanor conviction the crime is a misdemeanor ab initio. See People v. Segura (1955), 134 Cal. App.2d 532, indicating the existence, even today, of this brand of confusion.



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Prior to 1947 the defendant, convicted of an alternative sentence-type offense, stood convicted of a felony until such time as the court rendered a judgment "imposing a punishment other than imprisonment in the state prison." *People v. Williams* (1945) 27 Cal.2d 220. At first blush one is left with the impression that only if the court imposes a sentence to the state prison does a felony conviction retain its status as a felony. Such, however, was not the interpretation given Section 17 by the courts. The exact converse was true and the cases held that the conviction remained a felony unless and until the defendant was sentenced to a term in the county jail, *People v. Ford* (1947) 81 Cal.App.2d 580, or only a fine was imposed. The inference which the courts drew from the language of Section 17 was that the offense remained a felony except when the discretion of the court was actually exercised and the defendant punished only by a fine or imprisonment in the county jail. *In re Rogers* (1937) 20 Cal.App.2d 397, 400; *People v. Williams* (1945) 27 Cal.2d 220, 229; *People v. O'Brand* (1949) 92 Cal.App.2d 752.

The result of the construction which the courts placed upon Section 17 prior to 1947, of course, was that the defendant who was granted probation upon the suspension of the imposition of sentence remained a convicted felon. *People v. Christman* (1940) 41 Cal.App.2d 158; *People v. Ford* (1947) 81 Cal.App.2d 580. And such was the case though as a condition of probation the defendant was committed to the county jail or a fine imposed. *People v. Christman, supra; People v. Kuhloman* (1948) 86 Cal.App.2d 566; See *People v. Wallach* (1935) 8 Cal.App.2d 129; *In re Martin* (1947) 82 Cal.App.2d 16. On the other hand the defendant who received only a fine or county jail sentence lost his status as a convicted felon, his violation being deemed a misdemeanor for all future purposes, including that of impeachment. *People v. Landeau* (1928) 92 Cal.App. 405; *People v. McGee* (1914) 24 Cal.App. 563; *People v. Hamilton* (1948) 33 Cal.2d 45.

It is submitted that a twofold basis exists for the courts' conclusion that "a judgment imposing a punishment other than imprisonment in the state prison" means that a judgment must be rendered imposing a sentence to the county jail or a fine, and does not include the granting of probation. Firstly, it has been repeatedly

held in California that the suspension of the imposition of sentence and the granting of probation is not a judgment. *In re Marquez* (1935) 3 Cal.2d 625; *People v. Wallach, supra.* There is no finality in the proceeding granting probation. The court may at some later time revoke the probation and impose the sentence provided by law. *In re Hays* (1953) 120 Cal.App.2d 308. Secondly, probation imposes no penalty or punishment but is an act of clemency and grace whereby the deserving defendant may escape the extreme "rigors of the penalty" imposed by the law for the offense of which he stands convicted.[3] *In re Hays, supra; People v. Frank* (1949) 94 Cal.App.2d 740; *People v. Williams* (1949) 93 Cal. App.2d 777.[4]

In view of our previous discussion as to the rehabilitative rather than punitive nature of probation, it could be argued that the Legislature sought a change in the 1947 Amendment to Section 17. It could be contended that by the deletion of the words "imposing a punishment," the Legislature intended that the granting of probation be considered "a judgment other than imprisonment in the state prison."

Such an interpretation, however, would jeopardize the courts' effectiveness in the final disposition of a criminal case. Under such a construction the court would be virtually powerless after its order granting probation. By virtue of Section 17, the crime of which a defendant is convicted is deemed a misdemeanor for all purposes after judgment. If an order granting probation were deemed a judgment, the crime would be considered a misdemeanor and the court's power to punish the probation violator would be limited to a county jail-type sentence. Therefore, in view of the lack of finality in an order granting probation, and the results which would follow from a finding that probation is "a judgment other than imprisonment in the state prison," it can be said with confidence that the Legislature intended no change in the existing law by the 1947 Amendment. The defendant in the alternative sentence-type offense is released from his status as a felon only when the court imposes a fine or county jail sentence.

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[3]The defendant may refuse probation where probation appears to him more onerous than sentence.

[4]Analogous to probation is the commitment of a youthful offender to a reformatory. Such commitment is not "a judgment imposing punishment other than imprisonment in the state prison." See People v. Williams (1945), 27 Cal.2d 220.

As a final point in determining the status of a felony conviction the effect of an expungment of the record must be considered. Under Section 1203.4 of the Penal Code, a felony conviction may be erased upon the satisfactory completion of the probationary period. If the felony conviction has thus been eradicated it cannot thereafter be used to impeach the ordinary witness. *People v. Mackey* (1922) 58 Cal.App. 123. However, as specifically provided in Section 1203.4, such prior conviction may be used where the person is again on trial in a criminal case. The record is expunged only up to and until the party finds himself in trouble again. Under such circumstances the defendant, if he takes the witness stand, may be impeached by a prior felony conviction though he had satisfactorily completed his probationary period and had the record expunged in accordance with Section 1203.4.

People v. O'Brand, supra;

People v. James (1940) 40 Cal.App.2d 740.

In conclusion, a witness may be impeached by the showing of a prior act of misconduct only if such act amounted to a felony conviction. A defendant is convicted under California law at the time of his plea of guilty or the ascertainment of guilt by the fact-finding body. If the defendant is *convicted* of the violation of a statute punishable by imprisonment in the state prison, the defendant at the time of his conviction stands a convicted felon. If the conviction is for the violation of an alternative sentence-type offense then the court may change, by its judgment, the nature of the conviction. However, only by a judgment imposing solely a fine or imprisonment in the county jail is such offense changed from that of a felony to a misdemeanor. The suspension of the imposition of sentence and granting of probation, with or without a fine or detention in the county jail as a condition of such probation, is not "a judgment other than imprisonment in the state prison." Under probationary circumstances the defendant retains his status as a felon until his record is expunged in accordance with Section 1203.4 of the Penal Code. Such expungment, however, is ineffective if the person is again the defendant in a criminal case. In such event the felony conviction may be used to impeach him should he testify in his own behalf.

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A Suit-Bank for Lawyers

Anon.

Lawyers constitute an incohesive group of individuals of varying degrees of ruggedness. Almost evenly divided between two competing, but identical, political parties, they are as a group without political influence. I propose that lawyers unite in sponsoring a plan that will procure for them an access to the public trough heretofore awarded only to groups more corpulent and aggressive.

What I propose is a suit-bank for lawyers. Manifestly this is suggested by, and modelled upon, the soil-bank for farmers. In exchange for the farmer's promise to retire some of his less productive, or non-productive, land from cultivation for the next year, the Government pays him a stipulated amount, representing in practice, the optimum returns from his best lands. This enables the farmer to turn in his Cadillac a year sooner, which is good for General Motors and therefore, for the country.

How can this sound economic practice be turned to the benefit of lawyers? First, it is necessary to ask, what is one of the lawyer's main sources of revenue? Obviously, it is the bringing of lawsuits. If a lawyer can be paid for the suits he does not bring, we will have established a suit-bank for him. The principle is the same as paying the farmer for the crops he does not raise. But there are merits in the suit-bank which are wholly wanting in the soil-bank. Lawsuits clutter up the courts, take the time of judges and juries and administrative officials. Their growing multiplicity constantly demands new and larger facilities—new courthouses, for example, and courthouses cost money, particularly if you dig a hole to put them in, as we do in Los Angeles.

Naturally, some details of the suit-bank have to be worked out, but that should be easy, considering the beautiful simplicity of the plan. The lawyer is to be paid for not bringing so many lawsuits, the number varying with the individual, and depending on type of practice, past history, etc. Whether he is to be paid wholly or partly in advance of, or subsequently to, the not-bringing of the suits, is a detail. The farmer analogy suggests that the advance

payment is preferable, especially when it is remembered that it is easier to police the keeping of lawyers' engagements than it is those of farmers. And besides, farmers, a non-professional group, have no code of ethics to bolster up a rectitude that might falter in individual cases.

I regret that the suit-bank concept was not developed in time to be incorporated in the platform of either major political party. If it had been, I'm sure it would have been accepted by both. The only thing necessary to secure its adoption is to convince Congress that the plan has the united, and it is to be hoped, unanimous, support of lawyers, their wives, lineal descendants, collaterals and in-laws where possible, and their clients. With all this support, lawyers may look forward to attaining something of the political influence and dignity of, for example, the grange organizations, or even of the smaller labor unions.

Tax Reminder

CORPORATE DISTRIBUTION OF APPRECIATED PROPERTY

By JOHN O. PAULSTON*

Under the 1939 Internal Revenue Code the courts were divided on the question of the extent, if any, to which a distribution by a corporation of appreciated property, other than as a distribution in liquidation, resulted in ordinary income to the shareholder, as a distribution of a dividend. The Tax Court held that there could not be a distribution of the dividend except to the extent of the corporation's earnings and profits; the excess of the fair market value of the distributed property over the corporation's earnings and profits was treated as a recovery of the stockholder's cost basis for the shares on which the distribution was made, and as capital gain to the extent that such excess exceeded his basis. (See *Harry H. Cloutier,* 24 T. C. #113.)

Certain Courts of Appeal, however, held that the entire amount of the fair market value of the property distributed was ordinary income to the shareholder, regardless of earnings and profits of the corporation, and regardless of the basis for the shares. (See *Commissioner v. Hirshon* (2d Cir. 1954), 213 F. 2d 523, 45 AFTR 1608; *Commissioner v. Godley* (3d Cir. 1954), 213 F. 2d 529, 45 AFTR 1614.)

In interpreting the 1954 Internal Revenue Code the Internal Revenue Service originally proposed the adoption of the position of these Courts of Appeal, treating the entire fair market value of distributed property as ordinary income, regardless of the amount of the earnings and profits of the company. (Proposed Regulations Sec. 1.316-1(2).) However, as finally adopted, the Regulations provide that "Where a corporation distributes property to its shareholders on or after June 22, 1954, the amount of the distribution which is a dividend to them may not exceed the earnings and profits of the distributing corporation." (Regs. Sec. 1.316-1(2).) It thus appears that this point has now been removed from the area of controversy.

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*Member of the Los Angeles Bar Association and its Committee on Taxation.

Tax Reminder

New Social Security Coverage for Lawyers

By CHARLES M. WALKER*

Before its recent adjournment Congress approved a broadening of the Social Security law which, among other things, extended coverage to self-employed lawyers. For the guidance of those who will be enrolling under the program for the first time, some of the pertinent information is summarized below.

1. *Account Number.* If you have a Social Security card, your account will be kept under the name and number there shown. If you never had an account number, you should obtain one by completing an application form (SS-5) obtained from your Social Security District Office or post office.

2. *Taxes You Pay.* To receive credits you must pay the Social Security tax. The tax on self-employed is 3% of net earnings up to $4,200 yearly payable on a separate Schedule C filed with your regular income tax return. Your first self-employment tax will be paid on your 1956 income, returns for which are due by April 15, 1957. The tax rate will increase to 3⅜% on 1957 income, payable in 1958.

3. *How to Qualify.* Men may qualify for monthly payments upon retirement at age 65, and women at age 62. Generally you are fully insured at retirement age or death if you have worked under social security for a total time equal to half the time elapsed between January 1, 1951, and the date of death or retirement. After you have ten full years of work under social security, you become insured for life. However, an important special provision makes it possible during the time up to October 1, 1960, to become fully insured with less work. If you die or reach age 65 (women age 62) after March 1957, you will be insured if you work all the time from January 1956 until you become 65 (women age 62) or die. If you are already 65, you will be insured April 1, 1957, if you have net earnings of $400 or more in 1956 and in 1957. However, no one can qualify without a minimum requirement of 1½ years social security credit.

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4. *Currently Insured.* Benefits are payable to widowed mothers and minor children in the event of your death at any age prior to becoming fully insured. This is on the basis of "currently insured" status at the time of death. A person is currently insured if he has social security credits for at least a year and a half out of the three years just before his death.

5. *Benefits.* Amounts of benefits are determined from average earnings over a period of time. On average yearly earnings of $4,200 or more, monthly retirement payments after age 65 would be $108.50 for you or $162.80 for you and your wife. If, however, between ages 65 and 72, you earn more than $1,200 in any year, your payments will be reduced, and if you earn more than $2,080, you will get no payment at all. There is no such limit after age 72. Also, after your death, $81.40 would be paid monthly to your widow, child or parent; $162.80 to your widow and one child; and $200 to your widow and two children. You also will be entitled to certain disability benefits.

If more information is desired, it may be obtained from any one of the nine Social Security offices in Los Angeles County. A special bulletin "Self-employment and Social Security" may be obtained upon request.

Corporate Distribution of Appreciated Property

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Los Angeles Bar Association Tax Committee Luncheon

Thursday, December 13, 1956

12:15 p.m.

Galeria Room, Biltmore Hotel

$2.30, including tax and tip

JAMES H. KINDEL, JR., will speak at the December luncheon meeting being sponsored by the Tax Committee of the Los Angeles Bar Association. His subject will be "Term and Support Trusts."

Mr. Kindel, Chairman of the Tax Committee, is a graduate of U.C.L.A. and Loyola Law School. He has been a lecturer at the Title Insurance and Trust Company Tax Forum and is the author of articles on tax topics.

James L. Wood will preside at the meeting.

Reservations Must Be Made In Advance

Opinions of the Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 238
(September 27, 1956)

CONFLICT OF INTEREST. Probate Sales—Attorney Who Represents Administratrix Barred from Buying Decedent's Residence by Rules of Professional Conduct.

An attorney requests the opinion of the Committee on Legal Ethics with respect to the following circumstances:

> A long-time client of Attorney recently died, leaving an estate which included, as his separate property, a residence which Attorney had expressed an interest in purchasing during the decedent's lifetime. Attorney now represents the decedent's wife as administratrix and inquires whether he may purchase the property from the estate for his own personal use. The property has been appraised for $22,500; one bid was offered before the date of probate sale for $20,000, and one bid was offered after the date of sale (the property was not sold) for $19,000. Attorney will bid $21,500 if permitted to do so. Early sale is necessary or the value will decrease for lack of care of the property.

It is our opinion that Rule 8 of the Rules of Professional Conduct established by the Supreme Court of the State of California prohibits Attorney from making such a purchase *so long as he represents the administratrix* (or any other party in the estate proceedings).

Rule 8 provides:

> "A member of the State Bar shall not directly or indirectly purchase property at a probate foreclosure or judicial sale in an action or proceeding in which such member appears as attorney for a party."

This rule is unequivocal. While the facts which Attorney details indicate his good faith and attempts to make full disclosure to all

concerned, including other prospective purchasers, Rule 8 does not provide for any exceptions which permit an attorney—so long as he represents a party in a probate proceeding—to purchase property at a probate sale, whatever the level of his bid and however full his disclosure. In view of the stringent terms of Rule 8, it is our opinion that Attorney's purchase of the residential property at the same time that he represents the administratrix would be a clear violation of Business and Professions Code, Section 6077 and a violation of American Bar Association's Canons of Professional Ethics 32, which states in part:

> ". . . He (an attorney) must also observe and advise his client to observe the statute law, . . .".

This opinion, like all opinions of this Committee, is advisory only. (By-Laws, Article X, Section 3.)

Silver Memories

Compiled from the World Almanac and the L. A. Journal of October, 1931, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

The St. Louis Cardinals defeated the Philadelphia Athletics 4 games to 3 to win the World Series. The victory gave the National League its first World Series championship since 1926.

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On Cypress, in the Eastern Mediterranean, a mob demanding the return of the island to Greece, destroyed the official residence of the British Government at Nicosia. A Greek bishop was deported and a Greek Consul-General was ousted by the British.

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At Chicago, **Al Capone** was found guilty by a Federal Court jury on 2 misdemeanor and 3 felony counts of income tax evasion. Capone's sentence was 11 years in prison, $50,000 fine and the costs of the prosecution. Capone's bodyguard got a 6 months' sentence for carrynig a pistol in court.

* * *

In Louisiana, where Governor and U. S. Senator-elect **Huey P. Long** has been holding on to the governorship, Lieut. Gov. **Paul N. Cyr** took oath as governor and demanded the office, which Long barricaded with state troops. **W. L. Aldrich** of Shreveport took oath before a notary and proclaimed himself governor; and **A. O. King**, pres. pro-tem of the state senate, took oath as Lieut. Gov. Others too, took the oath. **J. C. Land**

of Shreveport swore in as claimant to Long's seat in the U. S. Senate.

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Both at Tokyo and Geneva the Japanese Government scored American participation in the League of Nation's Council and rejected Geneva's terms for a settlement of the Manchurian dispute. The American Government has sent notes to China and Japan reminding them of their obligations to refrain from war in Manchuria under the Kellogg anti-war treaty.

* * *

Parliamentary elections in the British Isles resulted in a landslide for the Conservatives supporting the National Government, and a crushing defeat for the Laborites. The Labor party leader, **Arthur Henderson,** was defeated in his own constituency. Premier **MacDonald** was reelected in his bailiwick. The National group elected 553 members of Parliament, the opposition 59. **Lloyd George** was reelected, and **Winston Churchill.**

* * *

At Worcester, Mass., a committee of the American Antiquarian Society opened a bottle of Madeira Wine, sealed at a dinner in October, 1831, and found it still good. After a taste it was laid away for another century. **Calvin Coolidge** was reelected president of the society.

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The world's largest airship—the naval dirigible **Akron,** 785 feet long, was formally accepted by the U. S. Government after several trial trips.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

A sampling of the voting population in three different areas in **New York** (Cayuga County, Buffalo and New York City), taken shortly after the 1954 state-wide election, disclosed: (1) Not more than 1% of the voters could remember the name of "the distinguished jurist for whom they had voted and who was elected as Chief Judge of the Court of Appeals—the highest judicial office in the state"; and (2) only 4% of the voters could remember the name of *any* judicial candidate for whom he had voted.—From a recent address by Allen T. Klotts, President, Association of the Bar of the City of New York.

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Want to Make a Speech?

The **Texas** Bar Journal advises that "mimeographed copies of speeches suitable for lawyers to make before civic and school groups" may be obtained upon application to the State Bar Secretary, Austin, Texas.

* * *

Manitoba is full of law firms with long and difficult names, and there is one firm in Winnipeg that offers itself to the public under two different tongue-twisting styles, as follows: (1) Pitblado, Hoskin, Grundy, Bennest & Drummond-Hay, and (2) Pitblado, Hoskin, McEwen, Alsaker, Hunter & Sweatman. They compassionately offer their correspondents a cable address: "Camfords."

* * *

Mayor Robert F. Wagner has appointed a 35-member Committee on the Structure of the Courts for the **City of New York.** The committee will examine the City's nine court sys-

tems which include 280 judges, 182 of whom are elected on party tickets where nomination by the dominant party is tantamount to election.

* * *

How It Started

"In Philadelphia, in 1868, a transaction was consummated which demonstrated the necessity for some further type of protection [against defects in title to real property] than was afforded by the mere examination of the records. To this transaction can be traced the existence of title insurance as it is now known.

"In the case of *Watson v. Muirhead,* 57 Pa. 161, a conveyancer had made a title search and disclosed the existence of a judgment. The attorney who checked the title advised that the judgment was not a valid lien, and, based on that information, the purchaser completed his deal. The judgment creditor thereafter issued execution and the property was sold at sheriff sale. After litigation, the Court held that the judgment was a valid lien, and that the sheriff sale was good.

"The purchaser, having lost his investment, sued the conveyancer for the loss he suffered by reason of the improper advice. It was held that the conveyancer was not negligent. He had taken all reasonable precautions and even though his advice was incorrect, there was no liability.

"As a result of this loss, caused almost entirely without fault on anyone's part, and without negligence, a group of individuals, who were themselves deeply interested in the law of real estate, decided that something should be done to protect innocent purchasers and mortgagees from similar hazards. After appropriate legislation had been adopted, a title insurance company was formed March 28, 1876. It is still functioning today, and is now named 'Land Title Insurance Company.'[1] It is universally recognized as 'The World's Oldest Title Insurance Company.' "—From an article on "Pennsylvania Land Titles and the Development of Title Insurance" in *The Shingle* of the Philadelphia Bar Association.

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[1]This company is located in Philadelphia. So far as is known to this department, there is no connection between it and the Los Angeles company of the same name.